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In the Supreme Court

OF THE

UNITED STATES.

FRANK P. DICKSON,
Appellant,
v.
RICHARD C. PATTERSON, *et al*,
Appellees.

CASE NO. 14,514.

BRIEF FOR APPELLANT.

BY

CHAS. OFFUTT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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Counsel.

OMAHA PRINTING COMPANY.

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STATEMENT.

This is an appeal from a decree dismissing a bill exhibited in the Court below by the appellant Dickson against the appellees Patterson and one Martin a fictitious person—or Patterson by another name. This bill sought to charge Patterson with holding the title to ten acres of land in Omaha, Nebraska, in trust for Dickson, and to require an account for the proceeds received by Patterson from previous sales of portions of the land.

Patterson was a real estate dealer in Omaha. Dickson was a resident of Kansas City, Mo., and the wives of these two men were sisters, their families exchanged visits and the two men

were friends, as Dickson thought. In May, 1885, Patterson wrote Dickson proposing the purchase by the two jointly of a designated tract of land in the suburbs of Omaha, saying (Record, p. 81):

"This ten acres will cost $4,800, $2,500 cash. They will make forty-eight lots worth $250 each. If you want to go in it will cost you $1,250 cash, balance to suit. Please answer immediately what you wish."

After some further correspondence, during which Patterson strongly urged the purchase (Record, pp. 81-2) Dickson consented to join him in the venture, and on May 30th, 1895 (Record, p. 83), sent Patterson $1,250 to meet his half of the cash payment. June 10th, 1885 (Record, p. 89), the land was conveyed by deed of general warranty to Patterson and Dickson jointly. June 11th, 1885, Patterson wrote Dickson, saying: "The title to this ten acres was yesterday put in the name of Richard C. Patterson and Frank P. Dickson in common." (Record, p. 84.) With this letter he enclosed "a rough plat" designating the property as Patterson and Dickson Place," and dividing it into fifty town lots (See plat, between pages 84 and 85). On this plat, Patterson "put the proposed prices on the lots" (Record, p. 85) ranging from $175 to $250 per lot. July 17th, 1885, Patterson having had the land "surveyed and platted" sent to Dickson the dedicatory plat, asking Dickson's signature and acknowledgment (Record, p. 85). This Dickson promptly gave. On August 17th, 1885, Patterson wrote Dickson advising that he had advertised the addition in the Omaha Bee, saying:

"How this may turn out I am sure I can't tell. We may have good luck in selling and then we may have poor. Real estate is and has been dull here for over two months."

The remainder of this letter is of a personal nature (Record, pp. 85-6). On August 24th and 26th, 1885, Patterson wrote Dickson in the same strain of affectionate personal consideration (Record, pp. 86-7). On October 21st, 1885, Patterson again wrote Dickson, saying:

"*Dear Frank:* I have sold our ten acres to-day for $6,000, an advance of $1,200. It did not turn out as well as I expected. There has been about ten thousand lots of these kind thrown on the market this summer. * * * * This is a very handsome

profit for the length of time we have held it. He pays $3,000 cash and the other $700 inside of six months, and assumes the mortgage and all taxes. It nets us a little over $500 each profit. As soon as deed is returned and delivered, he is to pay the money, $3,000 cash, and give note for balance due. I'll send you draft for your half right away on receipt of money." * * * (Record, p. 87.)

With this letter Patterson sent a deed to be signed by Dickson and his wife, conveying the land to Otto Boehme for the recited consideration of $6,000. He urged its immediate execution and return by Dickson, and Dickson and wife did execute and return it to Patterson on October 27th, 1885. The deed to Boehme was executed by Patterson and wife October 28th, 1885, on its return from Dickson to Patterson, and was recorded October 29th, 1885 (Record, bottom p. 95), but before its delivery(?) Patterson changed the consideration from $6,000 to $10,000. On the same day, October 29th, 1885, Boehme conveyed the land to Patterson for the recited consideration of $10,500 (Record, pp. 96-7). On October 30th, 1885, Patterson sent Dickson his check for $1,500, saying in his letter.

"When I sent you statement of expenses and our net profit on sale of property, I neglected or rather forgot to figure in the interest we owed on the $2,300 from the 10th of June to date of deed, which is the 28th of October. Our net profit all told was $948.35½. Of that amount half is $474.18, which added to $1,250 equals $1,724.18 due you, about 100 per cent. for each on the investment, the check which I send you herewith, and the $224.18 which is yet due you, and which will be paid you on or before six months of date hereof." (Record, p. 88.)

All this was while Dickson was living in Kansas City., Mo., but in the spring of 1886 he by accident came to suspect that Patterson had misrepresented the first cost of this land, and that he had sold it for $10,000,00 instead of $6,000.00. He wrote Patterson under date of February 27th, 1886, saying:

"In your letter last October you state you sold it for $6,000, the deed called for same amount, but I notice the records, etc., call for $10,000—a slight difference of $4,000. This change seemed to have occurred after the paper left Kansas City. Then, too, I object to the original cost of the land as stated in your letter last May, viz, $4,800 ($2,500 cash and $2,300 in note),

when I know now the land only cost $3,600 or a difference of $1,200, making my half interest cost $600 less than you stated, which, taken together with my half of the $4,000 which you did not report, would be something like $2,600 which you are owing me." (Record, p. 179.)

On receipt of this letter, Patterson wrote Boehme March 1st, 1886, telling Boehme of Dickson's complaint, and saying:

"Please do me the favor to drop Mr. Dickson a note, explaining why the records show $10,000 instead of the actual price. I never thought at the time you asked me if you might change the deed from $6,000 to $10,000 before you placed it on record it would ever amount to anything, or I should not have granted your request so willingly. This shows the folly of sometimes doing innocent things. It certainly places me in a very unpleasant light, and I feel you will be only too glad to explain the facts to Mr. Dickson and fully exonerate me." (Record, p. 163.)

Thereupon Boehme, under date of March 2d, 1886, wrote Dickson:

"Mr. R. C. Patterson has just sent me a note which I enclose so you can see why I write you. Last fall when I bought them 10 a from Mr. Patterson I paid him $600 a acre, and for the 10 a. I paid him $6,000 and no more. The next day, after he gave me the deed and abstract, I went and asked him if he cared that I would change the amount in the deed to $10,000, so it would appear that I paid a big price and I might be able to sell it at a big profit. Mr. Patterson said he didn't care, as it made no difference to him how much I made it. * * * From what dealings I have had with Mr. Patterson I can say he is honest and straight, and I believe bears that reputation." (Record, p. 105.)

Patterson, after thus prompting Boehme, himself wrote Dickson under date of March 3d, 1886, wherein, after confirming Boehme's story as to the recited consideration of $10,000 in the deed to Boehme, he said:

"As to the land being originally purchased for $3,600, I simply state it is not true. * * * I am very glad to be able to explain all discrepancies in a manner that cannot be impeached, and when necessary can prove it up with living testimony, and plenty of it." (Record, pp. 160-1.)

This correspondence continued for some time with much feel-

ing on both sides (Record, pp, 158, 159 and 160). In the meanwhile Patterson, without the knowledge of Dickson, vacated the plat of "Patterson & Dickson's Place" (Record, p. 97) and replatted it under the original dedication, with the same lot and street boundaries, as "East Side Addition" (Record, p. 89). Of these lots Patterson sold:

1886.

April 21,	4 lots to Fawcett for...	$3,600 cash.	(Record, p. 98.)
May 1,	1 lot to Pippin for.....	900 cash.	(Record. p. 100.)
May 1,	2 lots to Montgomery for.	1,800 cash.	(Record, p. 101.)
May 1,	1 lot to Millhouse for....	900 cash.	(Record, p. 102.)

Total cash proceeds of sale of lots up to May 1st, 1886.....$7,200

This too was all before any part of the $2,300.00 constituting the deferred payment on the original purchase matured. Dickson continued to make inquiries from time to time by correspondence with Patterson. Patterson answered in an evasive and untruthful manner, always misrepresenting the facts to Dickson and endeavoring to make him believe that his suspicions were ill-grounded. Dickson recognized that Patterson was his brother-in-law; that they had theretofore been friends (as he thought) and was slow to believe that Patterson had deliberately perpetrated so base a fraud upon him. He did not *know* that Patterson's statements were untrue. There were personal and family considerations which impelled him to hope that they might be true.

Little by little the facts developed, however, until on August 4th, 1886, Dickson becoming convinced that he had not only paid all, and more than all, the cash used by Patterson in the purchase of this land, and that the $7,200.00 received by Patterson from the sale of lots up to May 1st, 1886, had been more than three times sufficient to discharge the deferred payment of $2,300.00 and interest, exhibited his bill in the Court below, charging that the original purchase price "was $3,600 and no more"; that he had paid all the purchase money; and that the conveyances procured by Patterson to be made to Boehme and thence from Boehme to Patterson were in pursuance of a preconcerted scheme and device on the part of Patterson to

procure the title to all of this land in himself. He prayed that the transfers by which Patterson thus acquired title through Boehme might be declared fraudulent and void, and that as he (Dickson) had furnished all the purchase price of the land, Patterson might be adjudged to hold all thereof for his (Dickson's) sole use and benefit, and that Patterson might be brought to an account for all the moneys which he had received from the sale of lots after he thus fraudulently acquired title. In this bill Dickson offered to return all moneys which he had received from Patterson as his share of the proceeds of the sale to Boehme, while he thought the transaction was square.

To these charges Patterson answered saying that the land did cost originally $4,800.00, "that he did contribute his share of said purchase money for said property and denies the allegation in the bill to the contrary." He further averred that it was untrue "that the consideration of said sale to said Boehme was $10,000.00, but avers the fact to be that the consideration was the sum of $6,000.00 and no more or less." Thereupon he averred that after the execution of the deed to Boehme, the consideration was changed from $6,000.00 to $10,000.00 at Boehme's request, but that this was done "with no intent to injure or defraud Dickson." He admitted that thereafter Boehme conveyed the property to him, but said that this was in consideration of $6,500.00, and that it "was so done for the reason that after Boehme had purchased said property he became dissatisfied with the purchase"; that said sale to Boehme and from Boehme to him "was not by way of any contrivance or design to cut off the interest of Dickson" but the sale "to said Boehme was a *bona fide* sale and said purchase by this defendant was a *bona fide* purchase of said property"; that he "at all times truthfully and correctly reported to the complainant the facts relating to said purchase and did pay over to the complainant the complainant's share of the profits arising out of said sale."

Two weeks after the exhibition of the original bill, Patterson lodged for record a deed purporting to convey the unsold portion of this land to one Isaac Martin. Thereupon Martin was made a defendant by an amended bill, and Patterson's solicitor entered the voluntary appearance of Martin and filed his answer, wherein it was averred that Martin was an innocent purchaser, notwith-

standing the fact that it was conceded that his deed was recorded long after the commencement of the suit.

Replications were filed under the rules, and the parties proceeded to their proofs. By these proofs the truth of every averment made in the bill was established by ample testimony, except that instead of the original purchase price being $3,600, as Dickson had charged, it was shown to be only $3,300, $1,000 cash and $2,300 in equal payments of one, two and three years thereafter. So that the $1,250 advanced by Dickson not only paid all the cash required to effect the purchase, but left in Patterson's hands $250 more for which he had never accounted. In addition to this $250 Patterson had received the $7,200 by the sale of eight lots, making a total of $7,450. From this he paid the $2,300 deferred purchase money and had left $5,150 and forty-two lots in addition.

It was clearly shown that Martin was a fictitious person. He never testified in the case. There was no such person. Isaac Martin was no other than Patterson himself. It was further established that a day or two before Patterson wrote Dickson on October 21st, 1885, advising that he had sold the land for $6,000 Patterson had learned that two new lines of railway and a depot were soon to be constructed in the vicinity of this land. Patterson never communicated this fact to Dickson, and Dickson being in Kansas City, knew nothing about it. The location of these lines, however, caused a marked advance in the value of land, and whereas it had been purchased in June for $3,300, it was in October following worth over $10,000. Boehme was shown to be an office boy in Patterson's office with no property or means whatever.

The case came on for hearing before His Honor Judge Brewer, when circuit judge. That learned judge found the charges of fraud and misconduct to be true, but assuming the charges as true, he held that Dickson with knowledge of the fraud retained what he had received from the sale and elected to let it stand and pursue his claim for the moneys still due him thereon, and thereby ratified the action of Patterson, and estopped himself from the right to complain. (Record, pp. 204 and 205.)

SPECIFICATIONS OF ERROR.

It is submitted that there was error in the decree below to the prejudice of the appellant, in this:

I. The Court erred in finding that there was acquiescence by Dickson in the fraud of Patterson with full knowledge of the facts. (Pp. 8 to 26 *infra.*)

II. The fraud established, as charged in the bill and found by the decree, the Court erred in not rendering a decree for Dickson in accordance with the prayer of the bill. (Pp. 8 to 26 *infra.*)

III. The answer of Patterson made no defense based upon his alleged retention of the proceeds of the sale, the election to let it stand, and pursue his claim for the moneys still due him thereon, and it was error in the trial Court, without such defense having been interposed by answer to grant any relief based upon this theory, even though, as a matter of fact, the evidence did establish such acquiescence and election by Dickson. (Pp. 26 to 28, *infra.*

Of these specifications in their order:

SPECIFICATIONS I AND II.

I. THE FACTS UPON WHICH THE LEARNED TRIAL JUDGE BASED HIS CONCLUSIONS OF LAW UTTERLY FAIL TO CONSTITUTE A RATIFICATION OF THE SALE BY DICKSON, BECAUSE DICKSON DID NOT THEN POSSESS FULL KNOWLEDGE OF THE FRAUD.

In his finding of law and fact, the learned judge, after expressing his view that the charges of fraud and misconduct were well founded, proceeded to give his reasons for dismissing the bill. He said (Record, p. 204–5):

"The charges of fraud and misconduct are, I fear, well founded It is true that if defendant's testimony is to be taken as wholly and absolutely true, there was no wrong; but it is impeached by so many circumstances, that I am afraid it is not to be depended upon. * * * Assuming that the charges of fraud are proved, I think complainant's letters of February 27th, May 12th, May 18th, September 4th and September 14th, 1886, show that complainant with knowledge of the fraud, not only retained what he had received from the sale, but elected

to let it stand and pursue his claim for the moneys still due him thereon."

It will be seen from this that the Court based its legal conclusion that Dickson had elected to affirm the sale, wholly upon the letters referred to. No other evidence is mentioned, and indeed, none other can be found in the record which even tends to support such a view. I propose therefore to discuss the showing made by these letters, upon which alone the Court's action in dismissing the bill is confessedly based, and I submit that they contain nothing which justifies the inference that Dickson elected to condone the fraudulent acts of Patterson.

In the first place, it is elementary that a ratification or election can be made only with full knowledge of all the facts. As the Supreme Court of Pennsylvania said in *Anderson's Appeal*, 36 Pa. St., 496:

"An election by matter *in pais*, can only be determined by plain and unequivocal acts, *under a full knowledge of all the circumstances, and of the party's rights*. One is not bound to elect until he is fully informed of the relative value of the things he is to choose between; and if he make an election before the circumstances necessary to a judicious and discriminating choice are ascertained, he will not be bound. These positions are clearly sustained by all the authorities."

And see also *Reaves v. Garret*, 34 Ala., 558, 562.

So indeed, the trial judge recognized, for he said later on in his finding that "one defrauded by a sale of his real estate, must *when knowledge of the fraud is brought home to him*, make his election." Let us see then if Dickson "*under full knowledge of all the circumstances*," made any statements in the letters or elsewhere which amounted to a ratification.

The appellant's letters referred to in the Court's finding all appear an pages 179 to 181 of the record. But they must be read in the light of Patterson's letters in answer on pages 159 to 162, and Boehme's letter to Dickson at Patterson's instance on page 105. So far as these letters refer at all to the matters out of which this litigation arose, they are confined entirely to Patterson's failure to make a fair division of the profits of their joint transactions. They make no mention whatever of the conveyance to Boehme being a sham, the latter's transfer on the same day to

Patterson, or the deed to Martin executed after the commencement of this suit. Not only is there no reference to these acts, but there is not a scintilla of evidence anywhere that Dickson supposed the conveyance to Boehme was a sham, certainly nothing to indicate that Dickson knew or even thought that the deed was made from Boehme to Patterson. Yet these were the facts which made the conveyance fraudulent. The mere fact that Patterson withheld part of the proceeds of the sale to Boehme would not of itself have made the latter fraudulent. Hence, Dickson in calling upon Patterson to account for this balance, without knowing more, was not ratifying a fraudulent sale; he was simply demanding his rights so far as he knew them, but without knowing the extent of his wrongs or of his consequent rights. And the demands which Dickson did make showed that he thought the sale was genuine. If the sale to Boehme and the later one to Martin had been *bona fide* instead of fraudulent, then Dickson's only remedy would have been an action against Patterson for the former's balance of the profits. Hence, in demanding this unpaid balance, Dickson was doing precisely what the then existing state of his knowledge made it necessary for him to do in order to obtain his rights. But, when he later learned the real facts, he commenced his suit to set aside the fraudulent sale, offering at the same time to return so much of the proceeds thereof as would not have belonged to him in any case. That Dickson did not *know* what was the actual cost of the land in the first instance, is shown by the averment in his bill that "the whole purchase price was $3,600 and no more," and that the cash payment was $1,250 and no more (Record, pp. 3 and 14). In fact the purchase price was $3,300 and no more, and the cash payment was $1,000 and no more.

At the argument below it was urged that even though Dickson did not, when he wrote the letters referred to in the Court's finding, know of the fraudulent and fictitious character of the pretended sale to Boehme, still since the deeds to and from the latter were on record, Dickson was thereby charged with notice, and should have investigated the transaction further, until all the facts were discovered. There is no shadow of reason in such contention. There is no probabilty that any investigations which Dick-

son might have made would have disclosed the facts. Boehme was acting his part in the deal under instructions from Patterson. They were the only persons who knew the real nature of the transaction, and any attempt by Dickson (even had he really been placed on inquiry), to learn the facts from these parties, must necessarily have proved fruitless. More than this, an investigation of the records would have confirmed the delusion that the purchase price was $4,800.

But the conclusive answer to this claim is that Dickson had the right to rely upon the statements which Patterson had already made to him. In his letter of October 21st, 1885 (Record, p. 87), Patterson wrote: "I have sold our ten acres to-day for $6,000. * * * He pays $3,000 cash and the other $700 inside of six months." Here was a declaration of an absolute, *bona fide* sale —not a sham transaction by which Patterson could obtain Dickson's interest for a grossly inadequate sum. The same is true of Patterson's letters to Dickson of March 1st, March 3d, March 8th, and May 19th, 1886 (Record, pp. 158 to 162), as well as Boehme's letter of March 2d, 1886 (Record, p. 105). Dickson says in his testimony (Record, p. 48), "I thought it was a genuine sale and I did not know any different at the time." I repeat that he had a right to think so. He had a right to rely upon the declaration of Patterson that the latter sold the property, and he was not chargeable with notice of evidence in the public records or elsewhere, of Patterson's perfidy.

In the recent case of *Wilson v. Higby*, 62 Fed. Rep., 723, an action for deceit in the sale of land, the Court said in answer to the contention that the falsity of the vendor's representations might have been learned from the records:

"The weight of authority is to the effect that a vendee has the right to rely upon the representations of the vendor as to material matters connected with the land; and especially is this so in all cases, like the present one, where the facts in relation to such matters are within the knowledge of the vendor, and unknown to the vendee. In such cases the vendee may rely upon such representations, although other means or opportunities might be afforded to him to ascertain the truth. He is not bound, under the law, to go to the expense or trouble of verifying the truth or falsity of the statements made by the vendor, and the vendor is estopped from asserting that the vendee might readily

have ascertained the truth if he had examined the records of the county where the land was situated. The liabliity of the vendor arises from his own fraud and falsehood, and is not in any manner affected by the question of diligence upon the part of the vendee."

This language, used of a vendor and vendee, has far stronger application in the case of parties in the fiduciary relation of Patterson and Dickson. The latter had a right to rely upon the statements made to him that Patterson had sold the land in good faith to Boehme. Up to the time when he wrote the letters to which the trial judge attached such great importance, Dickson had received no different information. At that time the fraud which vitiated the sale was still concealed from him. Surely at that time, then, he could not have ratified it. Dickson's letters, too, were mere pretenses to Patterson that he knew more than he in fact did know, with the view of scaring Patterson to tell the truth.

Moreover, the rule which counsel for the defendant so vigorously invoked below, to the effect that one is chargeable with notice of facts concerning which he is put upon inquiry has no application here because the parties stood in a fiduciary relation. They were not only friends and brothers-in-law, but they were partners and joint owners. The rule governing such a case is well stated in *Marston v. Simpson*, 54 Cal., 189. It is thus expressed in the syllabus:

"For certain purposes the law will presume a person to have notice of facts in respect to which he has been put upon inquiry; but when a party is defrauded by another, between whom and himself special relations of trust and confidence exist, information as to the fraud by others will not constitute notice, if the party defrauded is in fact prevented from crediting such information by the representations of the other party."

And in the opinion the Court says:

"It is undoubtedly true that for certain purposes the law will presume a person to have notice of facts in respect of which he has been put upon inquiry. But where, as in this case, there are special reasons why one party should and, as a reasonable man, might place trust and confidence in another, the law will not impose on him the necessity of absolutely ignoring the persistent asservations of his 'friend and neighbor.'"

If this be the law regarding "friends and neighbors," how much more must it apply to such a fiduciary relation as that of Patterson and Dickson?

The cases cited by counsel for defendants at the argument below do not even tend to support the claim that any act or statement of Dickson's amounted under the circumstances to an election to affirm the sale. In nearly every case counsel relied upon some *dictum* in an opinion to the effect that a party is chargable with notice of whatever puts him upon inquiry. This general doctrine is in no way questioned, but as was pointed out above, it is not applicable to fiduciary relationships, the facts of this case do not fall within it, and the facts of those cases upon which counsel relied in the Court below, are entirely different.

Among other authorities cited was *Wood v. Carpenter*, 101 U. S., 141. The Court there was merely considering when the statute of limitations of Indiana began to run in an action against a judgment debtor to set aside certain conveyances of his as fraudulent, and it held that the defendant had not so actively concealed the fraud as to bring the case within that section of the statute which provided for suspending its bar during the concealment of fraud by the defendant. But the parties did not stand there, as here, in a fiduciary relationship, and the Court is far from saying that if they had, and that if one of them had made a false statement of fact to the other, such statement could not have been accepted without further investigation. Besides, *Wood v. Carpenter* was distinguished by this Court in *Rosenthal v. Walker*, 111 U. S., 185, where it is pointed out that the Court "was called on to construe a statute of limitations of the State of Indiana, and it followed the adjudications of the Supreme Court of that state upon the same statute." It is further shown in the last named case that in *Wood v. Carpenter* there was no reference to *Bailey v. Glover*, 21 Wall., 342, where the true rule governing cases of that kind is stated and it is held that so long as the party against whom relief is sought conceals a fraud, the statute does not run in an action for relief against it.

Another case cited below was *Grymes v. Sanders*, 93 U. S., 62. That was not a case of fraud, but of mistake. The Court says at the outset of the opinion: "The case rests entirely upon the ground of mistake." And again:

"The appellant was the defendant in the Court below. The record discloses no ground for any imputation against him. It was not claimed in the discussion at the bar, nor is it insisted in the printed arguments submitted by the counsel for the appellees, that there was on his part any misrepresentation, intentional or otherwise, and any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose to deceive on the part of others."

It is unfair to compare such conduct with Patterson's duplicity in the case at bar.

The same is true of the cases from the State Courts referred to by counsel. The portions of the opinions quoted from were mere *dicta*, stating only the general rule which no one questions, and the facts in none of them were applicable here. There was no fiduciary relation such as existed between Patterson and Dickson.

2. THE FRAUD PRACTICED BY PATTERSON UPON DICKSON WAS SO GIGANTIC AS TO BEGGAR BELIEF. IT WAS SO MONSTROUS THAT A COURT OF CHANCERY CANNOT SAY THAT DICKSON ACQUIESCED IN IT.

If the question were to be considered *de novo* in this Court, the record fairly teems with testimony which demonstrates that Patterson's part in this transaction with Dickson was one of deliberate and premeditated fraud. There were four distinct steps in this scheme of deception:

a. The misrepresentation as to the price paid for the land.

b. The colorable transfer through Koehme to Patterson.

c. The misrepresentations and fraud as to the consideration for this transfer, and the reasons therefor.

d. The fictitious transfer to Martin.

Let us follow the record as it discloses these successive chapters in this story of shameless fraud.

a. The misrepresentation as to the price paid for the land.

In considering this point it is well to remember that Patterson was the only man who figured at all as a purchaser. Neither Tukey nor Keysor, the grantors, ever knew or saw Dickson, and Patterson seems to have been careful to avoid mentioning the former's name until the papers were about to be passed and such mention became necessary (Record, p. 28, Q. 14; p. 32, Q. 54,

55). The conveyance was executed June 10th, 1885. But long before this Patterson had been seeking to have Dickson join him in the purchase. On May 18th, and again within a week (the second letter is not dated) Patterson had written proposing the purchase. In the second letter he evidently fears that Dickson will not assent, so (Record, p. 81) he enlarges upon the prospective profits, puts them at $6,000.00 net, praises the land and closes with the stock real estate shark's argument that he has another party anxious to buy if Dickson should be so foolish as to decline the tempting offer. All this before he had completed the negotiations with Messrs. Tukey and Keysor, or mentioned Dickson's name to them.

Now this eagerness to have Dickson buy, and this concealment from others of Dickson's part in the purchase, are explained when we come to consider Patterson's representations as to the price of the land. In the very first letter which he wrote to Dickson—the one in which he began the negotiations (Record, p. 81), Patterson says: "This ten acres will cost $4,800, $2,500 cash. * * * If you want to go in it will cost you $1,500 cash." A few days later he writes (Record, p. 82):

"As soon (as) I am satisfied of the title to this property being clear and unencumbered, I am to pay over the cash payment of $2,500.00."

On the strength of this, Dickson sent him $1,250.00. Yet the entire consideration, as shown by the grantors themselves, was but $3,300.00, and of this but $1,000.00 were paid in cash, (Testimony of Tukey, Record p. 27, Q. 56; of Keysor, Record p. 31, Q. 47.) Patterson not only paid nothing down for the land himself, but he pocketed $250.00 of the money sent him by Dickson, and then to cover up this infamy, he induced the grantors (Record, pp. 28, 33), to change the actual consideration expressed in the deed so as to correspond to the figures which he had falsely quoted to Dickson.

Confronted with these tell-tale facts, Patterson, when on the witness stand in his own behalf, sought to explain the discrepancy between the price as stated to Dickson and that paid to the grantors, by declaring that this difference of $1,500.00 was the commission which he paid to Sauer, the real estate agent with whom Tukey and Keysor had listed the land for sale.

This claim has no other basis in the record than the unsupported statement of Patterson. Sauer was then procurable as a witness, for he was under indictment in the District Court of Douglas County for larceny (Record, p. 145), and Sauer was the man of all others who could have told if Patterson had paid him $1,500.00 as commission for a single sale of ten acres. Yet Sauer was not called as a witness. Patterson claims to have paid the amount to Sauer in cash, yet he had no receipt (Record, p. 144 (225), 145 (226), nor does he even remember that any one else was present to witness the transaction (Record, p. 150 (233). He claims to have thought that Sauer was the owner and to have negotiated with him and paid him money as such. Yet, law student though he had been (Record, p. 137 (213), and real estate broker though he was, he never took a shred of writing from Sauer at all, even when (as he says) he paid him to bind the bargain. This coupled with the fact that he dealt in the matter directly with Tukey and Keysor, and that all the papers in the transaction passed to and from the latter, shows the absurdity of the claim that he thought Sauer owned the land. But the conclusive answer to this transparent effort at explanation is the fact that while the real consideration for the transfer from Tukey and Keysor was $3,300.00, that expressed in the deed was $4,800.00, *and this change was made at the request of Patterson himself* (Record, p. 28 (43). He went to Tukey and Keysor and had the figures raised from $3,300.00 to $4,800.00 so as to correspond with the price as quoted to Dickson, and then he has the brazen effrontery to pretend that he did not know that these men were the owners. Patterson had then been in the real estate business for about two years (Record, p. 137 (213), and was one of the most extensive dealers in the city of Omaha (Record, p. 141 (219). He knew the customs of the trade, and it is most ridiculous to suppose either that he believed Sauer to be the owner when he was dealing all the time with Tukey and Keysor, or that, knowing Sauer to be only the agent, Patterson paid him $1,500.00 commission on a $3,300.00 transaction, when the regular brokers' commissions were "five per cent. on the first thousand and two and one half per cent. on subsequent amounts' (Record, p. 33 (51), or just $107.50 for this particular sale. Patterson's attempt to explain leaves him in a worse plight than

if he had said nothing, and the evidence is overwhelming that he misrepresented the purchase price to Dickson in order to get the latter's money, part of which he pocketed and then procured the deed without paying one cent of his own. The whole scheme was thus fraudulent from its inception. It was "conceived in sin" and we shall see that it was "brought forth in iniquity."

b. The colorable transfer through Boehme to Patterson.

Having thus begun the transaction by compelling Dickson to furnish all the money needed, therefor (and twenty per cent. more), Patterson was well prepared for the next act, which consisted in his getting all the land. Patterson employed in his office a young man named Otto Boehme, then about twenty-four years of age (Record, pp. 76 (119), 70 (109-10). This youth was both impecunious and illiterate. After leaving Patterson he seems to have been idle for several years (Record, p. 108 (168). To use his own expression when testifying, he "might have been bumming three or four years" (Record, 108 (168). At the time of testifying he was working in an Omaha hotel (Record, p. 108 (169). There is nothing whatever in the facts disclosed in the record concerning this man which indicates that he had any means with which to purchase real estate, even on a small scale, and of this Patterson must certainly have known. Boehme's letter to Dickson (Record, p. 105 (164) shows the former to have been crude and ignorant. Such was the man whom Patterson chose as the tool for perfecting his fraudulent design. In October, 1885 he sends to Dickson for signature a deed for the whole tract, with Boehme's name as grantee, and expressing the consideration as $6,000.00 (Record, p. 45 (69). At the same time Patterson writes a letter (Record, p. 87 (136) stating, "I have sold our ten acres to-day for $6,000.00, an advance of $1,200.00." Evidently, too, he felt it necessary to explain why he did not receive more, and the remainder of his letter is largely taken up with an attempt to so explain and with assurances that they have made "a very handsome profit." After this deed was signed by Dickson and returned to Patterson, *the expressed consideration was changed from $6,000.00 to $10,000.00.* Why this was done can best be understood from the discussion of the next subdivision. Suffice it here to say that the alteration was

made in Omaha after Dickson and his wife had signed the deed, and was unknown to either of them until long afterward. Even Patterson was unable to pretend that this piece of jugglery was quite excusable, though he had done much the same thing with the deed from Keyser and Tukey. In a letter to Dickson after the latter had discovered this fraudulent alteration, Patterson writes:

"The discrepancy between the deed which we all signed for $6,000, and the record of the same showing $10,000, is one that you might well be justified in looking upon with suspicion and for which I do not at all blame you." (Record, p. 160 (250.)

Coming from one who is usually so fertile in apologies and explanations as Patterson, this concession speaks volumes. The deed from Patterson to Boehme was recorded on October 29th, 1885 (Record, p. 95 (151). On the very same day Boehme executed a conveyance of the identical ten acres (it having meanwhile, however, been platted into an addition) to Patterson (Record, p. 97 (153). Patterson subsequently had the plat of Patterson & Dickson Place vacated (Record, p. 97 (153), and replatted as East Side addition, and containing fifty lots (Record, p. 89 (139-½), which he immediately proceeded to sell as rapidly as possible, the price being uniformly $900.00 per lot (Record, pp. 100-103 (157-62).

Patterson's attempt to claim good faith for this collusive transfer—this pretended sale for $6,000.00 to his impecunious office boy, followed immediately by a transfer to himself—this attempt is even more incriminating than the effort to explain his eagerness to have the expressed consideration in the original deed raised from $3,300.00 to $4,800.00. I say it is more incriminating, for in this latter case his stories are contradictory. In both his original and amended answers (Record, pp. 9-10 (14-15), 21 (32), Patterson gives as the reason for taking the transfer from Boehme, that the latter was "dissatisfied with his purchase and liable to be embarrassed by reason" thereof. In his deposition, however, he states an entirely different reason. He there says (Record, p. 134 (209) that immediately before the return of the deed which he had sent to Dickson, he received information from another real estate dealer that the Missouri Pacific Railway had located its line, and probably its depot, near the land and that

"Knowing he was more or less interested with railroad men and their plans, I went immediately that day and offered to purchase back the property from Boehme, and I succeeded that day or the day following in purchasing back the same ten acres which I sold him for the consideration of $6,500."

Note the language! "I went immediately * * * and offered to purchase back the property from Boehme and I succeeded." Here is a plain contradiction. In one instance the purchase is represented as having been brought about solely by Boehme and upon his account; in the other as having been greatly desired by Patterson, but the motive being concealed from Boehme for obvious reasons. These conflicting accounts clearly corroborate the charges in plaintiff's bill. They show that Patterson was uncertain in his own mind what explanation he should make of this sham transaction with Boehme.

But the contradiction just referred to was not the only one. In his testimony Patterson declares (Record, p. 158 (246) that his purchase from Boehme was in good faith and that "there were *no conditions* whatever about it." He had evidently forgotten the letter (Record, p. 158 (247) which he had written to Dickson two years before, in which he had said:

"When the party who bought the ten acres was unable to raise all the money or give sufficient security, I demanded property to be put *conditionally* in my name till that could be done."

"*Conditionally!*" This is the way he wanted Dickson to understand it at that time. But when he came to testify, having kept the property during the interval, or sold what he did not keep, he could not longer claim that the transfer was conditional, and, forgetting his former explanation, he devised one more adapted to a changed situation. This is simply another demonstration that Patterson had no consistent account to give and that the real facts in the transfer were such as he dared not relate. These confused and contradictory statements, coupled with the relations between Patterson and Boehme, the latter's irresponsibility, financially and otherwise, the eagerness of Patterson to have the land transferred in his own name the moment he received the deed from Dickson, and the rapid disposal of the lots—all these demonstrate more plainly than words that this

transfer from Boehme was but another step in the conspiracy to defraud Dickson, which was so cunningly commenced by inducing Dickson to purchase, and then deceiving him as to the price.

c. The misrepresentation and fraud as to the consideration for the transfer to Patterson, and the reasons therefor.

In the preceding subdivision of this discussion it was shown that the deed sent by Patterson to Kansas City to be signed by Dickson and his wife, was altered by the former after it had been returned to him, and the expressed consideration changed from $6,000 to $10,000. This alteration which was concealed from Dickson, and which, after its discovery even Patterson admitted to have been quite suspicious, is explained by certain events which had then quite recently occurred, and it in turn explains Patterson's eagerness to get the property in his own name. About the middle of October, 1885 (Record, p. 53-4 (82-83), it became generally known to property owners in the vicinity that two lines of railway, one called the Belt Line, the other the Missouri Pacific Railway, were to be located near this tract which Patterson and Dickson had purchased. As a result of these prospective improvements, real estate in that locality began to advance rapidly from about the 15th of October on, and the value of the tract in question is estimated by six different real estate dealers in the City of Omaha: Messrs. Bell (Record, pp. 53-4 (82-3), Hicks (Record, p. 58 (90), Shriver (Record, p. 63 (98), Ames (Record, p. 67 (107), Reed (Record, p. 70 (109), and McCague (Record, p. 75 (117), at from $800.00 to $1,000.00 an acre; more of them, however, placing it at $1,000.00 than at the lower figure. The record contains also the affidavits of two other real estate men, one of them, Charlton (Record, p. 207 (321), placing the value of the tract at $15,000.00, and the other, Frenzer (Record, pp. 207-8 (323), at $14,000.00. These men I say were practical real estate dealers. Moreover, they were particularly acquainted with, and most of them dealt in, property in the locality of the Patterson and Dickson tract. These men, too, give instances of actual sales at that figure, and they further give, as a reason for the enhancement, the prospective construction of these new lines of railway. Other witnesses called in behalf of the defendant place the value at a lower figure, but they

are not only fewer in number, but most of them give mere hypothetical opinions and do not refer to actual sales, and besides are unable to explain why the promised improvements should not result in just such a rise in values as is testified to by those called on behalf of the appellant. Moreover, the conveyances which Patterson himself made of the property after it had got into his name, show that the values fixed by his witnesses are entirely too low. The tract was platted by him into fifty lots and those which he sold were for the expressed consideration of $900 each (Record, pp. 100–3 (157–62). The preponderance of the evidence is clearly to the effect that this ten acre tract which was purchased in June for the actual consideration of $3,300, had risen by the 15th of October to a selling value of more than $10,000. It was this sudden stimulation of the real estate market which caused Patterson to rush through the pretended sale to Boehme. The last preceding letter written by him which appears in the record was August 26th (Record, p. 87 (136), and nothing seems to have passed between him and Dickson after that date until October 21st., when he writes "I have sold our ten acres to-day for $6,000." No prior correspondence regarding any sale, no previous intimations to Dickson that negotiations were in progress, but the first letter which breaks the silence of two months is one which is written at this critical period in the real estate market, bearing the information that the property had been sold, and containing a deed with the urgent request to have it signed and returned immediately.

Patterson, however, has something to say in the way of explanation of these suspicious circumstances, but as usual he falls into a contradiction. He says (Record, p. 133 (207):

"The time to which Mr. Bell and others referred respecting the value of property in this locality by reason of the expected location of the Belt Line Railroad was on or about or a little after the first of November, and the time I negotiated the sale of this property to Boehme was along in the first part of October, of the fall of 1885, and there was no prospect or any talk of any railroad being located at that time that I knew of."

Shortly after this, however, he says (Record, p. 134 (309),

that he learned of this prospective railroad improvement "on the morning, or the day before possibly, of the return of the deed having been signed by Mr. and Mrs. Dickson." Now this deed was recorded on October 29th (Record, p. 95 (151), and a day or two before would be October 27th. By that time at least, instead of a little after the first of November, Patterson knew of the prospective improvements, even according to his own testimony. But the evidence of Bell, a disinterested witness, is explicit and positive that the information which led to this increase in values, was given out about October 15th. Patterson wrote his letter to Dickson announcing the sale as a completed fact on October 21st. And though there is every reason to believe that the facts were then well known to those on the ground Patterson said nothing whatever about it to Dickson. His letter consists of announcing the sale as completed, apologizing for not selling at a higher figure, but assuring Dickson that they had done well, and urgiug him to have the deed returned soon. Then after the deed was received, it was, of course, necessary that the consideration should appear as of a much higher figure than $6,000.00, both to disarm suspicion and to prevent prospective purchasers from regarding the property as worth less than that surrounding it. Hence the alteration in the deed—a fact otherwise inexplicable but easily understood when considered in connection with the testimony showing the rise in real estate values—a fact too which confirms that testimony in every particular.

d. The fictitious transfer to Martin.

The final step in the conspiracy to deprive Dickson of his land consisted in a pretended sale to an alleged grantee named Isaac Martin. Complainant's original bill in this case was filed on August 4th, 1887 (Record, p. 1 (1). Just two weeks after this, or on August 18th, 1887, a deed was filed for record with the register of deeds purporting to convey the principal part of the land in controversy from Patterson and wife to this Isaac Martin. This deed was ostensibly dated June 4th, 1887, but was acknowledged before John O. Patterson, defendant's brother. When asked how it happened that the deed was not lodged for record until two weeks after the commencement of this action,

Patterson had no explanation to make. He simply answered that he did not know (Record, p. 170 (265). Nor has there ever been any satisfactory account of who the alleged grantee Isaac Martin was. The only parties who claim to know anything of him are the defendant Patterson and his brother. Patterson's account of him is clearly shown in the testimony to have been false in the one particular in which it was capable of being tested, and there is consequent reason to believe that it was fictitious in all other respects. When asked what Martin's address was between the dates of February 17th and June 4th, 1887, Patterson was positive that it was Chicago, care of the Palmer House, and he stated moreover that Martin had instructed Patterson to address him there (Record, p. 167 (261). On this point the testimony of the manager of the Palmer House was taken (Record, pp. 121-2 (190-1). He had also been clerk of the hotel during all the period when Patterson was so positive that Martin lived there, and his testimony is explicit that Martin was not a guest of the house during any part of that time. The force of this testimony was sought to be impaired by the fact that he might have been a transient guest stopping for an occasional meal and not registering; but under such circumstances he would hardly have ordered his mail sent to the hotel for a continuous period of nearly five months. This incident, unimportant in itself, speaks volumes in favor of the view that Martin was purely a fictitious character, invented by Patterson for the purpose of getting away from the reach of Dickson, the property in controversy. The fact that John O. Patterson wrote the deed, that no one other than the Pattersons pretended to know anything of Martin, that in the one particular where their account of him was capable of being investigated it was found to be false, and the further fact that the recording of the deed took place so long after the commencement of the suit, all go to show that the transaction was in line with the events which had preceded it, and was a fitting sequel to them. Well might the trial judge observe concerning the testimony of the defendants: "It is impeached by so many circumstances that I am afraid it is not to be depended upon." This is a mild characterization of the history of this case. No impartial mind can read this record without find-

ing it replete with evidences of fraud, cunningly conceived and stealthily carried into execution. The trial judge could not well have come to any other conclusion regarding the questions of fact in this case, and his findings upon those questions, supported so conclusively by the testimony, leave but one question for this Court to determine, and that is whether this record shows that as a matter of law, Dickson's conduct has been such as to forfeit his relief from such a gigantic conspiracy, and let Patterson go unpunished for his wrong. The fraud and chicanery of Patterson were too monstrous. It beggars belief from the most indifferent cynic. Dickson could not believe that the husband of his wife's sister, the professed and ostensible friend of years, *his partner*, could be guilty of such enormities.

3. COMPLAINANT OFFERED TO REPAY THE SUPPOSED PURCHASE MONEY RECEIVED FROM PATTERSON, AND THERE IS NOTHING TO INDICATE THAT THIS OFFER WAS NOT MADE WITHIN A REASONABLE TIME.

It was shown in the preceding point that when Dickson wrote the letters referred to in the Court's finding, he had learned merely that Patterson had apparently sold the land for an amount greater than had been stated to him, but that he had not yet discovered that Patterson had not really sold the land to Boehme at all, but had simply conveyed it through Boehme to himself. This knowledge, I say, had not been acquired when the letters were written, and there is nothing to indicate that it was acquired until within a reasonable time before the filing of complainant's original bill. No facts or circumstances were shown by defendant which even tended to put Dickson upon inquiry, living as he did, in a distant city, and not knowing of the purely local events which brought about this colorable transfer to Boehme. Of course, Dickson was not obliged to restore the purchase money received from the supposed sale until he had learned that the sale was fraudulent and that he was entitled to repudiate it *in toto*. But when he did so learn, which I repeat, was, not, so far as this record shows, until just before August 4th, 1887, when he filed his original bill, he made an explicit offer to return this money. In that bill he prays (Record, p. 5 (8):

"That it be by the said account ascertained what, if any, sums your orator ought to repay to the said defendant, and he now here offers to pay such sums as soon as the same shall be ascertained in manner aforesaid or otherwise."

The multitude of authorities therefore cited by counsel in his argument below, to the effect that Dickson could not maintain this bill because he had not returned or offered to return the money received, have no application. Dickson did so offer, and defendant has suggested nothing which even tends to establish that either this offer or the election to rescind was not promptly made.

It must be remembered too that there is no showing here that Patterson so changed his position after the commission of the fraud and before Dickson's offer to return the money, that he was in any degree affected by not receiving the offer sooner. Upon this point an English case frequently cited by American judges and text writers, is instructive. In *Clough v. Ry. Co.*, L. R., 7 Exch. Cas., 35, it is said:

"In such cases the question is, has the person on whom the fraud was practiced, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that *so long as he has made no election he retains the right to determine it either way*, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But we cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind."

Nor, even were it true that Dickson had discovered the entire fraud in February, 1886, would it follow that his offer to return the money had been unreasonably delayed. That offer was made in 1887, less than eighteen months after the first intimation from Dickson that he doubted Patterson's fidelity to him.

In *Wicks v. Smith*, 21 Kan., 302—a decision concurred in by Judge Brewer—the return of purchase money received from a fraudulent sale was not made until more than two years after the discovery of the fraud, yet the defrauded party was held to be entitled to relief. And the Court in the syllabus states the rule as follows:

"The mere delay of the party who finds himself defrauded, in rescinding a fraudulent contract, and returning the property he has received under the contract, does not take away the right, if in the interval while he is deliberating no innocent third party has acquired any interest in the property, and the wrong-doer, in consequence of the delay, is no way affected injuriously in his position."

So it is held in *Marston v. Simpson*, 54 Cal., 189, that a delay of six months in rescinding will not deprive a defrauded party of his right to relief.

In *Williamson v. R. Co.*, 29 N. J. Eq., 311, it is said in the syllabus:

"Delay in exercising the right of rescission is evidence of an election to treat the sale as valid, of more or less weight, according to the circumstances of the case, but of itself does not operate as an estoppel, unless in the mean time third persons have acquired rights in the property *bona fide* and for a valuable consideration."

But a complete answer to this position of counsel is in the fact, as shown above, that Patterson by the retention of the $250 paid by Dickson in June, 1885, and the $7,200 received from the lots sold in April and May, 1886, had no right to ask a return of the $1,500 paid by him to Dickson in October, 1885. If Dickson's prayer had been granted the Court would have charged Patterson with this total of $7,450, some $5,950 more than he had paid Dickson. Why then should a Court of equity require Dickson to tender in return money to one who owed him four times as much as he had received?

SPECIFICATION III.

APPELLEES HAVING FAILED TO PLEAD THE ALLEGED ACQUIESCENCE AND ELECTION OF APPELLANT AS A DEFENSE, THE TRIAL COURT COULD NOT GRANT ANY RELIEF BASED UPON THIS THEORY, EVEN THOUGH THE EVIDENCE HAD ESTABLISHED SUCH ACQUIESCENCE AND ELECTION.

It has been noted that the Court below dismissed the bill upon the sole ground that Dickson had acquiesced in the fraud and elected to affirm the sale—in other words, that he was estopped by his conduct to claim the relief asked in his bill. It is submitted that this is a matter which a party must plead as a distinct defense in order to be of avail. Mr. Justice Curtis, speaking for this Court in *Philadelphia etc. R. Co. v. Howard*, 13 How. (U. S.), 307, 335, said:

"If a party has opportunity to plead an estoppel, and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel, and commits the matter to the jury, who are to find the truth. 1 Saund. 325 a. n. 4; 2 B. & A. 668; 2 Bing., 377; 4 Bing. N. C., 748."

This rule applied clearly implies that where a party omits an opportunity to plead facts amounting to an estoppel, the Court will ignore such facts as would have that result were the defense properly pleaded, and will consider and decide the case only upon the issues raised by the pleadings.

So in *Mabury v. Louisville, etc. R. Co.*, 60 Fed. Rep., 645, 656, the Court of Appeals for the Seventh Circuit said:

"An estoppel by contract, which this is said to be, is a species of estoppel *in pais*, and must be specially pleaded, or it cannot be relied upon. Bigelow, Estop. (5th Ed.), 455; *Wood v. Ostram*, 29 Ind., 179; *Robbins v. Magee*, 76 Ind., 390; *Cole v. La Fontaine*, 84 Ind., 448; *Stewart v. Beck*, 90 Ind., 458."

But in this case the answers contained no such plea. The answers gave no notice that the fraud would be confessed or avoided in this way. Indeed, this would have been wholly inconsistent with the defense which was interposed. Patterson's claim throughout was that he acted in good faith, and that in

his transactions with Dickson there was no fraud. This was the theory upon which his answer was based, and in support of which his testimony was given. This was the only issue which appellant was called upon to meet. To claim that Dickson acquiesced in the fraud and estopped himself from asking relief against it, when all the time Patterson was strenuously insisting that there had been no fraud, is not only inconsistent with the defense that the transaction was honest, but is unfair to appellant.

It is respectfully asked that this Court reverse the decree dismissing the Bill, with directions to the Court below to enter a decree for Appellant.

CHAS. OFFUTT,
Solicitor for Appellant.

WESTEL W. MORSMAN,
Counsel.

Omaha, Nebraska, September 23rd, 1895.

Office Supreme Court, U. S.
FILED.
OCT 14 1895
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

FRANK P. DICKSON,
Appellant,
vs.
RICHARD C. PATTERSON ET AL.,
Appellees.

Case No. 14,514.

15

Brief for Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR APPELLEES.

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Brief for Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

This is an action brought by the appellant to rescind a sale of real property on the ground of fraud by the appellee. Two questions only are involved:

First.—Was the respondent, Richard C. Patterson, guilty of the fraud charged in complainant's bill?

Second.—If so, did the complainant, with sufficient knowledge of the facts, acquiesce in the fraud?

STATEMENT.

The first of these questions requires a succinct statement of facts. The matter of fraud was resolved against the respondent Patterson, by the trial judge, in what counsel for appellant styles "a mild characterization;" but counsel himself

atones for this judicial mildness by vehemently denouncing the transaction as "a fraud so monstrous that it beggars belief from the most indifferent cynic," whatever that may mean. To be sure the alleged fraud is altogether a matter of argument; for Justice Brewer, who tried the case, was constrained to observe, (record, p. 204.) "It is true that if defendant's testimony is to be taken as wholly and absolutely true, there was no wrong; but it is impeached by so many circumstances that I am afraid it is not to be depended upon."

Now circumstances are only suspicious when they are unusual, and we frankly admit that the informal, not to say reckless manner of dealing with real property titles during the Omaha boom would strike a jurist, used to the niceties of real property law, with astonishment. The truth is, and the records in this case sufficiently reveal it, that for several years, during the boom, real-estate agents and speculators dealt in "options" on city lots with no greater caution, and no more investigation, than do grain speculators deal in "options" in a bucket-shop. If this fact is borne in mind it will account for much in the conduct of all parties concerned.

What then are the facts?

Mr. Patterson and Mr. Dickson married sisters. Mr. Dickson lived in Kansas City; Mr. Patterson lived in Omaha. In the year 1884 Mr. Dickson was visiting his *quasi*-brother-in-law in Omaha, and expressed a desire to invest some money in Omaha real property whenever Patterson should be of the opinion that there was money to be made. In the year 1885 a speculator of the name of Souer called upon respondent Patterson and represented that he had an "option" on a certain ten acre tract located several miles beyond the western horizon, which tract he would sell for $4,800.00. The property was in the vicinity of other property owned by Patterson. He accordingly accepted Souer's proposition and paid that

individual $100.00 down in order to bind the bargain; after which he wrote the appellant the letter of May 18, 1885, (record p. 81), as follows:

"DEAR FRANK:

I am about buying another addition. When you were up here last fall you spoke of wishing to have an interest in the next piece of property I purchased. This ten acres will cost $4,800.00, $2,500.00 cash. They will make 48 lots worth $250.00 each. If you want to go in it will cost you $1,250.00 cash, balance to suit. Please answer immediately what you wish, as there are two other parties waiting for me to give them an answer.

Respectfully,
R. C. PATTERSON."

The proposition contained in this letter was eventually accepted by the appellant who sent his draft to the respondent Patterson for $1,250.00, his share of the first payment.

Now it is claimed by Mr. Dickson that, as a matter of fact, instead of costing $4,800.00 the property in controversy was sold to Mr. Patterson for $3,300.00. That instead of requiring an actual cash payment of $2,500.00, the owners of the property received in cash but $1,000.00 and that herein consisted fraud No. 1. In the letter written the same month as the one quoted above, (see record, p. 81), the location of the property is accurately described, and an opinion given as to the profits which might reasonably be hoped for. The appellant was presumably acquainted with the approximate location of the property, for it is described as "just on this side of Patterson's subdivsion, and a fourth of a mile nearer to the city and nearer to the main street," and the letter implies an acquaintance by complainant with Patterson's addition, an acquaintance obtained, doubtless, on the occassion of his visit to Omaha the previous year. If, therefore, the

letters of Patterson had contained nothing more than this language: "*I* am about buying another addition. *You* spoke of wishing to take an interest in the next piece of property *I* purchased. If *you* want to go in it will cost *you* $1,250.00 cash, balance $2,300.00 to suit," there could be no pretence of fraud or misrepresentation; and yet this, in substance and effect, was precisely the proposition made.

Mr. Patterson insists, however, that there was an actual cash payment of $2,500.00; $1,000.00 to Tukey and Keysor, and $1,500.00 to Souer for his option. (p. 132). Mr. Patterson asserts that his payment to Souer was by way of a note for $1,500.00, due one day after date, and not paid by him until nearly one year thereafter. The truth of this assertion is challenged by counsel for appellant, not because it *might* not be true, but because such a transactions would be "unusual."

Why unusual? A man of the name of Collins was owner of the record title. He had entered into a written agreement to sell the same to Tukey and Keysor; they in turn had given an "option" to Mr. Souer. Souer had given an "option" to Patterson on the payment of $100.00 cash. Patterson gave an "option" for a moity to Dickson. Keysor had borrowed his share of the money invested in the contract aforesaid from a friend in Minnesota. (See record, p. 193.) Patterson had borrowed a large amount from some friend in Pennsylvania, (see record p. 170); and heaven only knows from what source the other speculators concerned derived their money. All this was "unusual" in a strictly legal sense, but alas! only too usual as a matter of custom. In his brief counsel for appellant, (p. 16,) asserts: "This claim has no other basis in the record than the unsupported statement of Patterson. Souer was then procurable as a witsess, for he was then under indictment of the District Court of Douglas County for larceny, and

Souer was the man of all others who could have told if Patterson had paid him $1,500.00 as *commission* for the single sale of ten acres. Yet Souer was not called as a witness."

It will be observed that Mr. Patterson nowhere asserts that he paid $1,500.00 as commission, but that this amount was paid in the purchase of an option which Souer claimed to have upon the property.

But if the above statement of counsel is true and the evidence of Souer was procurable, why was Souer's evidence not offered in rebuttal? Patterson had testified how he arranged for the $1,500.00 how the payment was made, and about when he fulfilled his obligation. And yet complainant neither called Souer, who he admits was accessible, nor does he even ask to see the note of $1,500.00 which Patterson testifies he had given that gentlemen in payment. On this point Patterson's testimony is as follows: (p. 149.)

A. After the papers were transferred I gave Souer my note for $1,500.00, payable one day after date, as I remember, for his interest in the ground.

Q. Why he had no interest, had he? Or had he ever exhibited any to you?

A. I bought the property of Souer, and in those real estate days there was as much property sold on options, as I understood it, as was sold by the parties who held the legal title.

Q. When did you pay this note of $1,500.00?

A. Along about a year afterward, I think. * * *

Q. About when would that be? (p. 150.)

A. Along in May or June, 1886.

The deed to the property was taken in the name of Patterson and Dickson, (p. 174) Collins conveying to Tukey and Keysor, who were the immediate grantors. A mortgage and notes for the unpaid balance of $2,300.00 was executed by Patterson and Dickson to Tukey and Keysor. (pp. 90–91.) The land was platted into lots and became Pattersons &

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Dickson's Addition to the city Omaha. This was done in July, 1885, and for the next two months the addition was extensively advertised in the Omaha Bee, and Patterson & Dickson's Addition to the city of Omaha boomed according to the usual methods. There can be no question as to the genuineness of Mr. Patterson's efforts to market this property. In his letter to complainant of August 24, 1885, (record, p. 86), he plaintively remarks, "There is one great thing needed on the addition to make it a grand success, and that is *a good new house* with a respectable family living in it. * * * I would be willing, if you were, to deed a good man a couple of lots for nothing, on condition he would build right away a house worth not less than $2,000.00. It would pay us well. It is a nice place and promises to be near the belt line railway."

But in spite of even such glittering inducements, the ten acres in question continued, and still continued, for that matter, good, virgin, Nebraska soil. So late as the 23rd day of February, A. D. 1886, not a solitary lot had been sold, (see record, p. 97, Ex. 00022,) and so late as April, 28, 1888, only four individuals had deen induced to purchase this desirable property in job lots from Mr. Patterson, and of the *eight* lots so disposed of, *four* of them were transferred to his partner, Jacob Fawcett, (record, p. 172,) subsequent to the commencement of the present suit. When, therefore, on the 21st of October, 1885, (p. 87), he wrote to the complainant that he had sold the entire ten acres for $6,000, the latter hastened to execute a deed for his moity, (p. 109–110), transmitting the same to Colorado to obtain the acknowledgement of his wife, accepted his share of the proceeds—several hundred dollars more than the amount originally invested—still retains the same, and was apparently happy in the result.

But it is asserted that the sale in question was fictitious, and was in reality a purchase of Complainant's undivided half

interest by Patterson himself, through the intermediary Otto Boehme, an employe in Patterson's office. The *indicia* of fraud which it is claimed warrants this finding are as follows:

Boehme, "a young man of about twenty-four years of age, both impecunious and illiterate," was at the time in Patterson's employ.

The consideration of $6,000.00 named in the deed when signed in Kansas City by the complainant, was, before recording, changed to $10,000.00.

This deed was recorded October 29, 1885, and on the same day Boehme executed a conveyance of the identical ten acres to Patterson.

As to these charges it ought to be sufficient to observe.

First.—The very fact that Boehme was in his employ would give Patterson the opportunity to persuade him into the purchase. If, as sworn to, Boehme actually paid $600.00 per acre for the land in question, he paid too much for it, according to the most reliable testimony of expert witnesses.

Second.—Boehme was a German, and possibly "illiterate" —his letter to Dickson would so indicate; (p. 105), but there is absolutely no testimony that he was impecunious, or that he did not actually pay for the land. He was called as a witness for complainant, and subject to two direct examinations. The fact was elicited that he was living with his mother. Whether or not she was of sufficient means to supply him with money for speculation was not elicited, and at no time during his examination was the question ever propounded to him by counsel for appellant as to whether he had ever paid for the property, whether he was of sufficient means to purchase the property, or where he obtained the money to make the purchase. Why should not Boehme, *as well as other impecunious persons*, have been able to borrow from a friend in Omaha, Minnesota, or Pennsylvania? The appellant, having made

him his witness, contented himself with drawing out the information that Boehme was a young man, a German, a single man, living with his mother. Of course the cross-examination of this witness was waived. But it seems extraordinary that the financial abilities of witness should not be challenged when the opportunity was given complainant to investigate his finances, and when Mr. Boehme himself was ostensibly called for the express purpose of making an accounting.

Third.—Boehme's alteration of the instrument after its delivery to him was unusual in one sense, and quite justifiable in another sense. He asked permission to do so from one of the grantors in the instrument—Patterson. The latter granted it with the same indifference that Tukey and Keysor testified they had granted a like privilege to him. *It was the usual thing.* An inflated consideration might have some influence upon a gullible public, but was otherwise harmless and immaterial, and we respectfully ask how in any aspect of the case this fact can be material? Counsel for appellant has devoted pages to the contention that even the $6,000.00 consideration was fictitious. Does he wish now to contend that so far from being fictitious, $10,000.00 was actually paid by Boehme, of which respondent accounted for but $6,000.00? If so, he has mistaken his remedy, and should renew his suit in a court of law.

Fourth.—It is true that Boehme had scarcely possessed himself of the legal title to this property when he conveyed it to the respondent, and unexplained, the circumstance would indicate that the transaction was pre-arranged. But the explanation is forthcoming and eminently reasonable.

Boehme was dissatisfied with the deal and apprehensive of the consequences. It may have been his first venture on so large a scale. He was therefore willing, and perhaps even anxious, to deed it back. About that same time Patterson

learned, or thought he learned, through some official of the Missouri Pacific Railroad Company, that the company had about concluded to locate its depot in the vicinity of this property. As early as August 24 he had written to complainant (record, p. 86), "it is a nice place and promises to be near the belt line railway."

Now we maintain that it could very well happen that, having waited for months without disposing of a single lot, Mr. Patterson was willing to sell the entire addition at a reasonable advance; that almost cotemporaneous with this resolve he should learn that a railroad might be constructed near the property and its depot located in the vicinity. All this, we say, might have been. It was a mere coincidence of time. The testimony is that it did so happen, and there is nothing in the record to show to the contrary.

Fifth.—But from a legal standpoint we cannot preceive that there was a fraud in legal contemplation, even admitting the truth of every inference sought to be drawn from the facts by counsel for appellant.

Suppose A writes to B that C will buy the property of the latter at a certain price, A intending all the while to become the purchaser. It may be deception, to be sure, but wherein does it cause an injury? Patterson had no sort of authority to dispose of this entire addition without the concurrence of the complainant. When Patterson announced to him in his letter of October 21, already referred to, (record, p. 87,) that he had sold the ten acres for $86,000.00, Dickson could have repudiated the sale so far as his moity was concerned, then and there. He knew the location of the property. If not, he could easily ascertain it by taking the cars at Kansas City at eleven o'clock at night and awaking in Omaha by seven o'clock the next morning. He knew, and had known for some time, that there was talk of a belt line to be located

near this property. He knew that Patterson had estimated the profits at $1,000.00 net, and with a knowledge of these facts he executed a deed for his undivided half, *and was never heard to seriously complain of the outcome until Patterson called him to account for a real estate transaction in Kansas City, in which he and Patterson were jointly concerned, and wherein his accounting had not been altogether satisfactory.* (See letters of Dickson to Patterson, February 27, 1886, March 15, 1886, pp. 179 and 180.)

Sixth.—The transfer to Martin is alleged to have been, in truth and in fact, subsequent to the commencement of these proceedings, so that he would be bound by any decree rendered herein. Whether this be so or not, the point is certainly immaterial as affecting the main issue.

This suit was commenced in August, 1887, and the taking of depositions begun in April, 1888. Between this time and the final submission in June, 1889, Mr. Martin neither reappeared in Omaha, nor made known his whereabouts. In view of his reincarnation shortly thereafter, the argument of counsel as to his non-existence deserves to rank among the humors of the law. If this Court would be pleased to order a *diminuition* of Mr. Martin, as a part of the record, he can be put very much in evidence. We respectfully insist that the finding of his honor, Judge Brewer, of the commission of fraud, was unwarranted by the proofs.

Complainant is estopped from insisting upon the frauds charged, for the reason that he ratified the sales by his conduct; failed to rescind upon the discovery of the alleged fraud; failed to put the defendant in statu quo, and acquiesced in the sale with knowledge of the facts.

The charges of fraud are:

a. That Patterson falsely represented to Dickson that

the original purchase price of the property in controversy was $4,800.00.

b. That Patterson falsely represented to Dickson that the cash to be paid on this purchase was $2,500.00, and thereby fraudulently obtained from Dickson $1,250.00 as his half of such cash payment.

c. That Patterson fraudulently represented to Dickson when the land was conveyed to Otto Boehme that the consideration of such sale was $6,000.00, and that in fact the sale to Boehme was merely colorable for the purpose of having the title to the property transferred to the defendant Patterson.

Our contention is that if the frauds were as charged by the plaintiff Dickson, that nevertheless, Dickson, with knowledge of these frauds practiced upon him, acquiesced in these transfers of the property and received his share of the proceeds of the sale, and has ever since continued to retain the same, and never returned or offered to return the money so received, and that he failed to elect to rescind the contract of conveyance after becoming possessed of knowledge of the frauds practiced upon him.

This was the view of the case taken by Judge Brewer, who heard the case upon the circuit. He stated his conclusions as follows: (p. 204-205.)

"The charges of fraud and misconduct are, I fear, well founded. It is true that if defendant's testimony is to be taken as wholly and absolutely true there was no wrong; but it is impeached by so many circumstances that I am afraid it is not to be depended upon. But I do not care to push any further inquiry in that direction. Assuming that the charges of fraud are proved, I think complainant's letters of February 27, May 12, May 18, September 4 and September 14, 1886, show that complainant, with knowledge of the fraud not only retained what he had received from the sale, but elected to let it stand and pursued his claim for the moneys still due him thereon. I understand the rule to be that one defrauded

by a sale of his real estate must, when knowledge of the fraud is brought home to him, make his election, and that promptly, and that having elected to let the sale stand, he can not thereafter maintain an action to set it aside. So I think defendant is entitled to a de ee dismissing the bill."

A statement of facts upon which we rely to sustain this view of the case is as follows:

May 18, 1885, (p. 81) Patterson writes a letter to Dickson in which he makes a proposition to Dickson to unite with him in the purchase of ten acres in controversy, price $4,800.00 cash payment $2,500.00. Dickson to pay one-half of the cash payment $1,250.00, which offer Dickson accepts. (p. 42.)

May 30, 1885, (p. 83) Patterson draws a draft on Dickson for the $1,250.00 which Dickson pays.

October 21, 1885, (p. 87) Patterson writes Dickson that he has sold the ten acres for $6,000.00, an advance of $1,200.00 over the cost price, $3,000.00 to be paid in cash, $700.00 in six months, and purchaser to assume the mortgage on the land, leaving a net profit of $500.00 to each of the parties.

October 26, 1885, (p. 94) Patterson and Dickson united in a deed of conveyance of the land in controversy to Otto Boehme.

The consideration named in this deed when executed by Dickson was $6,000.00. Before the delivery of the deed by Patterson to Boehme, Patterson changed the consideration named in the deed from $6,000.00 to $10,000.00, but which Patterson states was done at the instance of Boehme, and in fact the actual consideration was not increased above the $6,000.00.

October 29, 1885, (p. 95) Otto Boehme reconveys the property to the defendant Patterson.

October 30, 1885, (p. 88.) Patterson writes a letter to

Dickson enclosing his check for $1,500.00 being one half of the cash received from Otto Boehme referred to in the letter of October 21. In this letter Patterson further advises Dickson that after computing the interest upon the mortgage on the land he finds the net profit to be $948.35, Dickson's half of such profit $474.18, which added to the $1,250.00 advanced by Dickson would amount to $1,724.18 and that he would transmit to Dickson the balance of $224.18 within six months from that date.

About one month after the letter of October 30, 1885, Patterson paid to Dickson $112.00 being a part of this $224.18 yet coming to Dickson out of the proceeds of the sale. Touching this last named payment Dickson testified: (p. 49, folio 76.)

"Q. And this letter of October 30 remitting to you $1,500.00 was long after you had signed the deed?

A. About four or five days perhaps. It might have been a week. It was only a short time.

Q. About how long after this was it that you received the $112.00 being a part of the $224.18 which was to be paid to you?

A. About a month afterwards. A little over a month."

Again, as to the fact of the payment of the $112.50 Dickson testified (top p. 49):

"A. In the letter of October 30 there was a draft enclosed for $1,500.00.

Q. Has he ever paid you the remainder of $224.18 spoken of in this letter as a balance due to you after the payment of $1,500.00?

A. Not all of it.

Q. What part if any has he paid?

A. He has paid $112.50."

Dickson admits that he discovered the frauds about which he now complains in the winter of 1885 and 1886. (p. 50, folio 77).

"Q. When did you begin to believe that he (Patterson) was not acting in good faith?

A. In the following winter and spring.

Q. The winter of 1885 and 1886?

A. In the latter part of the winter and fore part of the spring, 1886.

Q. By that you mean the winter of 1885 and 1886?

A. It was the last of the winter of 1885, 1886, and the spring of 1886.

Q. That was within a few months after you had received this $1,500.00

A. About five or six months.

Q. This is written October 30th.

A. It was the next February or March that I discovered it, 1886."

Dickson further testifies: (p. 51.)

"Q. This discovery was in February, 1886, When you made that discovery in February, 1886, did you come up to see Mr. Patterson about it?

A. I wrote to him about it, yes, sir."

Notwithstanding this discovery in February, 1886, Dickson continued to retain the $1,500.00 which he had received as his share of the cash payment received from the sale of the land to Otto Boehme and also retained the $112.00 which had been paid to him by Patterson as a part of the proceeds of the sale.

Dickson so testifies, (p. 51.)

"Q. Up to that time, (meaning February, 1886,) you had been in possession of the $1,500.00 about six months?

A. About six months—five or six.

Q. And the $112.00 how long?

A. About three or four months probably.

Q. You still have that money?

A. No, sir.

Q. Did you use it in your business?

A. Yes, sir.

Q. I mean by that that you kept it. You did not give it back to Mr. Patterson?

A. No, sir."

The latter of February 27, 1889, written by Dickson to Patterson (p. 179) is as follows:

KANSAS CITY, MO., Feb. 27, 1886.

R. C. PATTERSON, Omaha, Neb.

Dear Sir: Your letter of the 12th and 16th inst. came to hand during my absence from home, and I note what you say and claim. I wish to state that I do not owe you one cent, nor do I propose to be blackmailed out of one dollar by you. I'm ready for you whenever you commence proceedings, but in the meantime perhaps you had better settle with me for that ten acres we bought together in Omaha. In your letter last October you state you sold it for $6,000, and the deed called for same amount, but I notice the records, &c., call for $10,000—a slight difference of $4,000. This change seemed to have occurred after the paper left Kansas City.

Then, too, I object to the original cost of the land as stated in your letter last May, viz., $4,800 ($2,500 cash and $2,500 in note), when I know now the land only cost $3 600, or a difference of $1,200, making my half interest cost $600 less than you stated, which, taken together with my half of the $4,000 which you did not report, would be something like $2,600 which you are owing me.

I cannot say with you, "thus far my feelings alone have been affected," but you have taken money from me by false representations, the knowledge of which fact has only lately come to my hands. Now I wish to know when you propose to pay me the above amount due. Awaiting an early reply, I am,

Yours truly,
F. P. DICKSON.

In the letter of February 27, 1886, it will be noticed that Dickson charged Patterson with each and singular the frauds set out in the bill of complaint in this action.

On March 15, 1886, Dickson writes another letter charging the same frauds: (p. 180).

KANSAS CITY, MO., March 15, 1886.

R. C. PATTERSON, Omaha, Neb.

Dear Sir: * * * You have never as yet denied

that the 10 acres in Omaha did not cost the $4,800.00 you represented it to have cost, but merely say it was never purchased by you at $3,600.00.

If you had the right, as you claim, of changing the figures in the deed you must had extraordinary power as an agent so to do and more than I or any one else, except it be power of attorney, however granted; you never had such authority from me I am sure.

When you penned the paragraph claiming that I owed you $2,250.00 as you had furnished three-fourths of the cash, you knew or must have known that you were stating what was not so. You knew you had not purchased one cent nor was the sale consummated to McLeary or any one else. Even if you had had any cause for a claim, you have lost that right by statements in your previous letters.

I claim you still owe me $2,600.00 on the 10 acre deal in Omaha and have never given up the claim as yet; am ready to receive your draft for same by return mail.

Yours truly,
E. P. DICKSON."

Patterson still owed Dickson $111.68 of the $224.18 coming to him from the sale of the land to Boehme as per Patterson's letter of October 30, 1885, (p. 88.) and six months and a half thereafter, and two months after Dickson had knowledge of and charged Patterson with these frauds he, Dickson, demands that Patterson shall make payment to him of the $111.68 due on account of the sale to Boehme. (p. 180).

"KANSAS CITY, Mo., May 12, 1886.
R. C. PATTERSON, Esq., Omaha.

Dear Sir: There is yet due me on your due bill of October 30, last $111.68, with interest to date at 10 per cent per annum, $1.25—$112.93, which you can remit me for in Eastern exchange. This was due on the 1st, but was overlooked by me or would have been attended to before.

Yours, &c.,
F. P. DICKSON."

"KANSAS CITY, May 18, '86.

Dear Sir: Please give my letter of the 12th inst. attention.

Yours truly,
F. P. DICKSON."

Four months later, and seven months after Dickson had full knowledge of the frauds, he again demands the payment from Patterson of the balance coming to him on account of the sale to Boehme. (p. 181.)

"KANSAS CITY, Mo., Sept. 4, 1886.

R. C. PATTERSON, Omaha, Neb.

Dear Sir: Yours of May 19th last was duly rec'd. have been patiently awaiting to hear from you again with draft enclosed for the $112.93 and interest due me. If it is as you say, it seems as if the note of Boehme should have been paid ere this.

Yours, &c.,
F. P. DICKSON."

"KANSAS CITY, Mo., Sept. 14, 1886.

R. C. PATTERSON, Omaha, Neb.

Dear Sir: Yours of 8th at hand and noted. It don't seem to correspond with yours of May 19th, wherein you state as soon as you receive the money from Boehme you will remit same to me, and had no desire to retain that which does not belong to you. Kindly let me know by return mail whether you intend paying me the am't, $112.93 and int., and when. it is long past due and I should like it at once.

Yours, &c.,
F. P. DICKSON."

The evidence already referred to shows that the appellant still retains whatever consideration was paid him, (considerably in excess of the amount invested), and nowhere manifests a disposition to return it or any part of it.

2.—Where a party intends to abandon or rescind a contract on the ground of fraud he must do so promptly and decidedly on the first information of

such fraud, if with full knowledge, or with sufficient notice or means of knowledge of his rights and all the material facts, he lies by for a considerable time, or abstains from impeaching the transaction, this will be construed as an acquiescence, and the transaction, although originally impeached, ceases to become so in equity.

This Court said in *Grymes vs. Sanders et al*, 93 U. S., 62.

"Where a party desires to rescind on the ground of mistake or fraud, he must on the discovery of the facts at once announce his purpose and adhere to it."

The evidence shows that not later than the 27th day of February, 1886, appellant had not only information of the alleged fraud and sufficient notice or means of knowledge of his rights, but full and complete knowledge of every material fact alleged in his bill, or adduced upon the trial. It is evident from Mr. Dickson's letter of this date, already referred to, that he had recently been in Omaha, and had made a dilligent use of his time. In his deposition (record p. 47) he states in a general way that he was in Omaha in 1884 and again *two years thereafter.*

He carefully examined the records, and therefore had full knowledge of all that the records would reveal. His language is, "I notice the records, etc., call for $10,000—a slight difference of $4,000," and therefore knew that the title to the ten acres in question was, at that time, in R. C. Patterson.

He knew that Patterson acquired his title through a conveyance from Boehme, and the date of that conveyance.

He knew of the discrepancy between the purported consideration of $6,000.00 when he signed the deed and the ostensible consideration of $10,000.00, as it appeared upon the records, for he calls attention to the fact.

He knew that Tukey and Keysor, the original grantors, had not received more than $3,600.00.

In short, he stated categorically and with assurance that complainant had taken money from him by false representations, and he further asserts that the knowledge of all these facts had only lately come to hand.

It would require some credulity therefore, to assent to counsel's statement that at the time of the writing of this letter, "no facts or circumstances were shown by it which even tended to put Dickson upon inquiry, living as he did in a distant city (to-wit, Kansas City), and not knowing of the purely local events which brought about this colorable transaction of Boehme.

This Court, in *Wood vs. Carpenter*, 101 U. S., 141, said:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Kennedy vs. Greene*, 3 Myl. and K., 722. "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

In *Dickey vs. Lyons*, 19 Iowa, 547, the Court said:

"The general rule is that whatever puts a party upon inquiry amounts in judgment of law to a notice of all such facts as by the exercise of ordinary duty and diligence would be developed by the inquiry."

In *Cambridge Valley Bank vs. Delano et al.*, 48 N. Y., 340, the Court said:

"Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry which, if prosecuted with ordinary diligence would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make inquiry, and if he does not make it he is guilty of bad faith or negligence to such an extent that the

law will presume that he made it, and will charge him with the actual notice he would have received if he had made it."

In *Bigelow on Fraud*, p. 288, it is said:

"The general proposition of law concerning constructive notice is, that if facts are brought to the notice of a party which put him as a man of common sagacity upon inquiry, he is bound to inquire, and if he neglects to do so he will be chargeable with notice of what he might have learned upon examination."

In the case at bar Dickson had actual notice of the pretended frauds practiced upon him as early as February 27, 1886. (See his letter of that date.) His bill was filed August 4, 1887, about eighteen months thereafter.

Merrill vs. Wilson, 66 Mich., 232, is a case on the facts quite similar to the case at bar. There the Court found that the plaintiff had knowledge of the fraud as early as December 22, 1885. The bill was filed the 7th of April, 1886, and this was held to be too late. The Court said (p. 243):

"A person, however, who has been defrauded, must act promptly; and, if he would repudiate the contract he must do nothing in affirmance of it after ascertaining the facts. Moreover, he cannot repudiate it and retain the fruit, or benefit of the transaction at the same time."

Paine vs. Harrison, 38 Minn., 346, is a case where the breach occurred in the summer of 1886, rescission declared in February, 1887, and held to be too late.

Bailey vs. Fox, 78 Cal., 389, is a case in which it was held that four months delay after discovery of fraud in a partnership contract was fatal.

In *Bell vs. Keepers*, 39 Kansas, 105, the Court used the following language:

"The evidence of plaintiff himself shows that he discovered shortly after contract was made, that the defendant had misled him in the description of the tract fronting on the boulevard. After such knowledge he paid several installments

upon the contract and also affected the sale of the other tract embraced therein to Marks. When he found out that the defendent had deceived him in the description of a part of the land, he should have at once rescinded or offered to rescind the contract, and reconveyed or offered to reconvey his interests in the property he had acquired thereunder. *He cannot be permitted to select his own time and consult his own convenience before exercising the right of rescission.* This would give him the power to retain the property and after waiting, if markets should prove favorable, he could then secure possible benefits and on the other hand have time to reconvey if it should decrease in value and thus escape all disadvantages. *The law does not allow any one to play fast and loose in such a manner.*"

In *Estes vs. Reynolds*, 75 Missouri, 563, a delay from June, 1876, to February, 1877, was held to be fatal. The Court said:

"It is fatal to the plaintiff's case that on discovering the alleged fraud and deceit upon which he bases his action, he did not promptly rescind, or offer to rescind the contract and return or offer to return the property he acquired by reason therof. And such rescission must be in toto. A party cannot affirm a contract in part and repudiate it in part. He cannot accept its benefits on the one hand, while he shirks its disadvantages on the other. He cannot play fast and loose in the matter. Nor is he permitted to select his own time in exercising the right of rescission. If he elects to disaffirm the contract in consequence of deception practiced upon him, such election in order to avail him must have the chief and *essential element of promptitude*, and he must put the other party in the same situation as he was before the contract was made. All authorities speak this language."

Dickson cannot maintain this bill because he did not return, or offer to return the purchase money received by him, to-wit: the $1,500.00 and the $112.50.

An action to rescind a sale of land on the ground of fraud will not lie unless the consideration paid is returned or tendered before suit, and an election that

the vendor is able and willing to return it and now offers to do so is insufficient.

Van Trott vs. Wisse, 36 Wis. 439, was a case arising between partners. The court said:

"A party who seeks to rescind an entire contract, because of fraud committed by the other party thereto, must return, or offer to return, whatever he has received under it. He cannot hold on to such part of the contract as may be desirable on his part, and avoid the residue, but must rescind *in toto* if at all."

In *Mason vs. Bovet*, 1 Denio 69, the court said:

"If a party defrauded would disaffirm the contract, he must do so at the earliest practical moment after the discovery of the cheat. That is the time to make his election, and it must be done promptly and unreservedly. He must not hesitate; nor can he be allowed to deal with the subject matter of the contract and afterward rescind it. The party who would disaffirm a fraudulent contract must return whatever he has received upon it. This is on a plain and just principle. He cannot hold on to such part of the contract as may be desirable on his part, and avoid the residue, but must rescind *in toto*, if at all."

In *Cobb vs. Hatfield*, 46 N. Y., 533, the court said:

"The taking of a benefit is an election to ratify it, and concludes him. He cannot be allowed to deal with the subject matter of the contract, and after disaffirm it. The election is with the party defrauded to affirm or disaffirm the contract; but he cannot do both. *Mason vs. Bovet*, 1 Denio, 69. By accepting the stock certificate, he elected to abide by the purchase. But if the certificate of stock was received before the commencement of the action, and before the plaintiff had knowledge of the fraud, he was bound, upon a recission of the contract, to restore to the defendants all that he had received from them, and all that he had acquired under it: to place the defendant *in statu quo*, as near as practicable. The law not only requires a disaffirmance of the contract at the earliest practicable moment after the discovery of the cheat, but a return of all that has been received under it and a restoration

of the other party to the condition in which he stood before the contract was made."

"To retain any part of that which has been received upon the contract is incompatible with its rescission. (*Masson vs. Bovet, supra; Voorhees vs. Earl*, 2 Hill, 288; *Hogan vs. Weier*, 5 Id., 389.)"

The case of *Masson vs. Bovet*, 1 Denio, 69, is quoted from, with approval, in *Hammond vs. Pennock*, 61 N. Y., 153.

In *Latham vs. Hicky*, 21 La. Ann., 425, the Court said:

"A party demanding the rescission of a contract must return or offer to return the consideration received by him. It is a settled principle in courts of equity that relief will never be extended to a party against his own conduct without exacting from him strict justice to his adversary. This is a condition precedent to be heard."

In *Wilber vs. Flood*, 16 Mich., 40, it was said:

"A mere offer to trade back is no rescission of a contract. The party aggrieved must do what he can to place the other *in statu quo*."

In *Woodbury vs. Woodbury*, 47 N. H., 11, it was said:

"The party rescinding a contract, if he has received any benefit from it, should restore or make compensation of the benefit received, so as to put the other party in as good condition as before."

In *Downer vs. Smith*, 32 Vt., 1, it was said:

"It is a common principle that when one has a right to rescind a contract, and exercises that right, he must restore the other party to the same position that he would have been in if no contract had been made."

In *Evans vs. Gale*, 17 N. H., 573, it was said:

"That in order to rescind the transaction the party must first restore to the other the consideration which he may have received."

In *Young vs. Arntze*, 86 Ala., 116, it was ruled:

"If the purchaser elects to rescind he must exercise the

right within a reasonable time after the discovery of the fraud, or the time when it ought to have been discovered, and has placed the vendor *in statu quo* by returning the machine to him at the place where it was delivered."

In *Thompson vs. Peck*, 115 Ind., 512, it was held that on discovery of the fraud the party must elect whether he will rescind the contract by returning, or offering to return, whatever of value he may have received, or whether he will retain the consideration and treat the transaction as subsisting. It was further held the notes and money received should have been returned in order to sustain an action in equity for rescission.

The rescission must be *in toto*, and property received under the rescinded contract must be returned and the adverse party put as far as possible *in statu quo*, whatever may be the ground of rescission.

Connor vs. Henderson, 15 Mass., 319.

Carneal vs. May, 2 A. K. Marshall, 587.

Durrett vs. Simpson, 3 T. B. Monroe, 517.

Insurance and Trust Co. vs. Lancer, 5 Fla., 110.

Perley vs. Balch, 23 Pickering, 283.

Kimball vs. Cunninghan, 4 Mas., 502.

Fay vs. Olliver, 20 Vt., 118.

Jennings vs. Gage, 13 Ill., 610.

Emerson vs. McNamara, 41 Me., 565.

Estabrook vs. Sweet, 116 Mass., 303.

Cook vs. Gilman, 34 N. H., 556.

"It is too late to put the party *in statu quo* at the time of trial. *Herman vs. Hafenegger*, 54 Cal., 161.

This rule is so stringent that even a married woman can-

not avoid a sale of property made by her, without restoring the consideration given by the purchaser.

Pilger vs. Smith, 2 Head, 208.

And the same rule will apply to infants, if at the time of calling for rescission they still have in their possession and control the consideration received for the sale.

Bartlett vs. Colles, 15 Gray, 445.

The failure to offer to return the consideration received will be treated as an affirmance of the contract.

Sandborn vs. Osgood, 16 N. H., 112.

Ayers vs. Hewitt, 19 Me., 281.

Rowley vs. Bigelow, 12 Pickering, 307.

Bigelow on Fraud, p. 410.

On the general proposition that Dickson should have returned the purchase money received, as a condition of rescision of the contract, innumerable authorities might be cited. We have been unable to find any case which would excuse Dickson from this duty. And he cannot escape his obligation to comply with this rule by a prayer for an accounting.

The evidence not only reveals the fact that the appellant has neither returned, nor offered to return at any time prior to the commencement of his suit, the money which he received, but his bill filed against this respondent nowhere tenders a single dollar. The only words used which might remotely be presumed to refer to the subject are those which pray an accounting by the Court to ascertain "what, if any, sum your orator ought to repay to the said Patterson," and he now offers to pay such sums as soon as the same *shall be ascertained*. Elsewhere in the sixth paragraph of his amended bill the complainant avers that "On the 30 day of October he (respondent) further addressed a letter to your orator enclosing therein his check for $1,500.00, and correcting a statement

formerly made as to the net profits, and stating further that $224.18 was yet due and coming to your orator."

Now it did not require any vast amount of accounting in a court of equity to know that $1,500.00 had been received, and ought, as a condition precedent and as a standing in court, to have been tendered back.

Counsel for appellent attempts to brush aside these well known equitable principles with the bland statement that had an accounting taken place as prayed for in the original bill. Patterson would have owed Dickson more than he had received. "Why then" asked counsel, "should a court of equity require Dickson to tender in return money to one who owed him four times as much as he had received?"

A sufficient answer to this novel proposition would be, that a court of equity does not adjudge cases in advance. If litigant, claiming to have been defrauded, could speculate in law suits and obtain a ruling on the facts, without even offering to restore such consideration as he had obtained, we could safely prophesy a vast increase in litigation.

Dickson, after discovering the fraud as indicated by his letter of February 27, 1886, should immediately have elected to rescind or abide by the contract. He elected to abide by the contract by retaining what he had already received and by the writing of the letters demanding that Patterson pay to him the balance of the money arising from the sale to Otto Boehme.

Bigelow on Fraud, p. 425:

"The defrauded party to a contract has but one election to rescind the same. If he once determines his election it is determined forever. Hence, if it be shown that he ever at any time after knowledge of the fraud, either by express words or

unequivocal acts affirmed the contract, his election is irrevocable."

In *Dennis vs. Jones*, 44 N. J. Eq., 513, it was said:

"It is the rule that the defendant party to a contract has but one election to rescind. That he will exercise that election with reasonable promptitude after the discovery of the fraud, and that when he once elects he must abide by his decision."

In *Arnold vs. Hagerman*, 45 N. J. Eq., 186, it was ruled:

"The election to rescind a contract on the ground of fraud must be made promptly upon discovery of the fraud. If any act is done by the complainant party after the discovery of the fraud towards perfecting or carrying out the contract, it is an irrevocable election to abide by the contract."

To the same effect see:

Grabenheimer vs. Blum, 63 Tex., 369.

Nounen vs. Sutter Co., 81 Cal., 1.

Whiting vs. Hill, 23 Mich., 399.

Vernol vs. Vernol, 63 N. Y., 45.

The evidence shows that if complainant had indeed been defrauded, lied to, and otherwise deceived, he knew it and proclaimed it, and had full knowledge of the fact he acquiesced in the fraud without ever repudiating or offering to rescind; but, on the contrary, made it a pretext for a set off to Patterson's claims growing out of the Kansas City deal. He distinctly elects to affirm Patterson's transaction, and asserts that because of the frauds above specified, Patterson still owed him $2,600.00 and he closes his very frank letter of February 27th with the pertinent inquiry, "Now I wish to know when you propose to pay me the above amount due me?"

The rejoinder of Patterson by no means allayed his suspicions. In his letter of March 15, 1886, (record p. 180),

he threatens Patterson with a law suit—surely his reference to a jury can have no other significance; he shows an appreciation of Patterson's want of power to change the consideration mentioned in the deed; and concludes his letter with a reiteration of his demand for $2,600.00. Incidentally he makes a sly reference to his own delinquencies in the Kansas City deal in the following language: "Even if you had had any cause for a claim, you have lost that right by statements in your previous letters." The tone of these letters indicates a spirit of counter hostility in case Patterson should press his Kansas City claim, with the subtle intimation, however, that honors were easy, and matters had better rest as they are.

Accordingly, so far as Dickson is concerned, the subject was dropped, and we hear no more of it until the commencement of this suit. In May following, however, he resurrects a due bill of $111.68, growing out of this very transaction, about which he had made such an uproar in February and March preceding, and respectfully requests a payment of the amount. (See record, p. 180.)

If Patterson had ever been troubled with a particularly guilty conscience, it seems as though he would have paid this small amount forthwith. But Dickson is obliged to remind him of his neglect by another letter dated May 18, (record, p. 180), and again September 4, 1886, and again September 14, 1886. (record, p. 181.) These facts constitute acquiescence. They cannot be otherwise construed, for if a person protesting that he has been defrauded, nevertheless demands payment of a small amount still due him on the original transaction, after knowledge of the fraud, how can this be otherwise construed than a ratification of the transaction complained of.

In the case at bar such a demand was made, not casually and inadvertently, but repeatedly and persistently. The whole law on this subject could not have been more accurately

or succinctly stated than in Judge Brewer's informal ruling contained in his letter of December 30, 1889, to the clerk of the Circuit Court, where he uses the following language: "Assuming that the charges of fraud are proved, I think complainant's letters of February 27, May 12, May 18, September 4 and September 14, 1886, show that complainant, with knowledge of the fraud, not only retained what he received from the sale, but elected to let it stand and pursue his claim for the moneys still due him thereon. I understand the ruling to be that when defrauded by a sale of his real estate, he must, when knowledge of the fraud is brought home to him, make his election and that promptly; and that having elected to let the sale stand, he cannot thereafter maintain an action to set it aside."

This respondent distinctly pleaded in answer that complainant, notwithstanding his said pretended discovery of said alleged fraudulent acts of this defendant, did not, on the discovery thereof, make a tender of the money received by him, nor returned, nor offered to return, said money, nor any part thereof, but that he retained, and still retains the same under a claim of right thereto.

He further answers alleging demands of complainant on this respondent for the payment of the balance due on the proceeds of said alleged fraudulent sale, and asserts complainant's acquiesence in said alleged fraud. (See record, pp. 24 and 25.)

With this amended answer staring him in the face, it is difficult to account for the third specification of counsel for appellant, and all that he says thereunder.

But in no event would it be necessary for respondent to plead acquiescence and ratification. In order to state a good cause of action it should affirmatively appear by complainant's bill that he had not acquiesced in the ratification of fraud, but,

on the contrary, had promptly repudiated the transaction on the discovery of the fraud, and had paid, or offered to pay the consideration received. All this must appear as a condition precedent to the right of recovery.

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